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8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA

10 -----X

Case No. 05-04867-JF (HRL)

11 DAVID HO, JOHN MAXTON, NATHAN LAY,
12 and SARAH FERNANDEZ on behalf of
13 themselves and all others similarly
14 situated and on behalf of the general
15 public and DOES #1-20,

16 Plaintiffs,

17 PLAINTIFFS' FIRST AMENDED
18 COMPLAINT

19 -against-

20 ERNST & YOUNG LLP

21 Defendants.

22 -----X

23 COMES NOW PLAINTIFFS, on behalf of themselves and all others
24 similarly situated and on behalf of the general public, hereby
25 allege:

26 **JURISDICTION AND VENUE**

27 1. This Court has jurisdiction over the claims alleged herein
28 because Plaintiff seek relief pursuant to Business & Professions
Code Section 17200 for the failure to pay wages due for work
performed within the County of Santa Clara, among other locations
within the State of California.

2. Jurisdiction is vested in this Court pursuant to the prior

1 removal of this case from the Superior Court of the State of
2 California to this Court on November 29, 2005 by the defendant
3 pursuant to the applicable provisions of 28 U.S.C. §§ 1441-1450.
4

5
PARTIES

6 3. Plaintiff DAVID HO (one of the "named plaintiffs") resides
7 in San Jose California.

8 4. Plaintiff DAVID MAXTON (one of the "named plaintiffs")
9 resides in Oceanside California.
10

11 5. Plaintiff NATHAN LAY (one of the "named plaintiffs")
12 resides in South San Francisco California. Plaintiff SARAH
13 FERNANDEZ (one of the "named plaintiffs") also resides in the State
14 of California.

15 6. Defendant ERNST & YOUNG is a partnership and one of the
16 nation's leading and largest public accounting firms employing
17 numerous certified public accountants ("CPA's") and other personnel
18 with offices and employees in California and throughout the United
19 State
20

21 7. The named plaintiffs are former employees of the defendant
22 and those similarly situated to the plaintiffs are former or current
23 employees of the defendant.

24
CLASS ACTION AND REPRESENTATIVE ALLEGATIONS

25 8. The named plaintiffs bring this action on their own behalf,
26 and on behalf of the class of all persons similarly situated and on
27 behalf of the general public.

28 9. The class consists of all persons employed by the Defendant
within the State of California as "Staff One" or "Staff Two" or

1 "Senior One" or "Senior Two" personnel, or similarly titled
2 personnel who were performing the same sort of functions of the
3 named plaintiffs, and subject to the same salaried compensation
4 system, from four years preceding the commencement of this action
5 through the date of judgment after trial who were not compensated
6 for their work and overtime work as required by California law.

7
8 10. The named plaintiffs seek to represent a class of persons
9 who are so numerous that the joinder of each member of the class is
10 impracticable.

11 11. There is a well-defined community of interest in the
12 questions of law and fact affecting the class the named plaintiffs
13 represent. The class members' claims against Defendant involve
14 questions of common or general interest, in that their claims are
15 based on Defendant's implementation and utilization of a policy
16 pursuant to which all members of the class were denied payment of
17 wages and overtime compensation during the time in question. These
18 questions are such that proof of a state of facts common to the
19 members of the class will entitle each member of the class to the
20 relief requested in this Complaint.

21
22 12. The named plaintiffs will fairly and adequately represent
23 the interests of the class, because the named plaintiffs are members
24 of the class and the claims of the named plaintiffs are typical of
25 those in the class.

26 **FACTS**

27 13. Plaintiffs hereby incorporate each and every allegation
28 contained of this Complaint above and reallege said allegations as

1 though fully set forth herein.

2 14. During all times relevant herein, the class members
3 supported the business of Defendant by working under the direction
4 of their superiors, the managers and partners of the defendant.
5 Such work involved the class members assisting their superiors in
6 the production of the products and services provided by the
7 defendant's business to its customers. The great majority of such
8 work by the class members included, but was not limited to,
9 secretarial, clerical, and data entry support work, including filing
10 papers, organizing and assembling documents, taking notes of
11 meetings, entering spreadsheet data and formatting spreadsheets, and
12 similar tasks requiring very little or no exercise of independent
13 judgment or discretion or any advanced professional degree or
14 license or the prior completion of any extended course of academic
15 or technical studies in any art or science.

17 15. Defendant compensated the named plaintiffs and the class
18 members on a "salary only" basis whereby the named plaintiffs and
19 the class members were paid a fixed salary for all hours worked
20 during each week.
21

22 **FIRST CAUSE OF ACTION: Overtime Wages**

23 (California Labor Code Section 1194)

24 16. Plaintiffs hereby incorporate each and every allegation
25 contained of this Complaint above and reallege said allegations as
26 though fully set forth herein.

27 17. At all relevant times, the named plaintiffs and the
28 plaintiff class members were required to work in excess of eight

1 hours during the workday and in excess of 40 hours during the
2 workweek and/or worked more than six consecutive days in a workweek.

3 18. During all relevant times the Wage Order No. 4 of the
4 California Industrial Welfare Commission provided that "...nonexempt
5 employees must be paid an overtime premium for all hours worked in
6 excess of eight during the workday and in excess of 40 during the
7 workweek, as well as for work performed on the seventh workday in a
8 work week...."

9
10 19. Although the named plaintiffs and the plaintiff class
11 members worked overtime as that term was defined in the relevant
12 wage orders, Defendant failed and refused to pay the legally
13 required state overtime premiums.

14 20. Therefore, Plaintiffs demand overtime compensation as
15 provided under California law.

16 SECOND CAUSE OF ACTION: OVERTIME AND UNPAID WAGES

17 (California Labor Business and Professions Code §§17200, et seq)

18 21. Plaintiffs hereby incorporate each and every allegation
19 contained of this Complaint and reallege said allegations as though
20 fully set forth herein.

21
22 22. Throughout the above-described period Defendant
23 repeatedly misrepresented to the members of the plaintiff class and
24 the general public that the plaintiffs were "professional" or other
25 sorts of employees exempt from the overtime laws of the State of
26 California, the defendant also failing to require or have the class
27 members take specified paid and/or unpaid meal and rest breaks as
28 required by California law and did not pay the class members an hour

1 of additional wages per day for such unreceived break time, as
2 required by California law.

3 23. This misrepresentation and omission by the defendant gave
4 defendant a competitive advantage over other employers who
5 legitimately paid their workers the proper overtime wages and other
6 wages required by California law and who also gave the employees the
7 meal and rest breaks required by California law or the additional
8 wages required by California law in lieu thereof.
9

10 24. Defendant's conduct described in this Complaint
11 constitutes an unlawful business practice in violation of the
12 provisions of Business and Professions Code §§17200, et seq.

13 25. Therefore, Plaintiffs pray for restitution and injunctive
14 relief for all class members for all wages due and an order pursuant
15 to Business & Professions Code Section 17203 to cease from failing
16 to pay overtime wages to workers employed or who render services to
17 Defendant within California.

18 THIRD CAUSE OF ACTION: STATUTORY INTEREST ON UNPAID WAGES

19
20 (Labor Code Section 218.6)

21 26. Plaintiffs hereby incorporate each and every allegation
22 contained of this Complaint above and reallege said allegations as
23 though fully set forth herein.

24 27. California Labor Code Section 218.6 states: In any action
25 brought for the nonpayment of wages, the court shall award interest
26 on all due and unpaid wages at the rate of interest specified in
27 subdivision (b) of Section 3289 of the Civil Code, which shall
28 accrue from the date that the wages were due and payable as provided

1 in Part 1 (commencing with Section 200) of Division 2."

2 28. Subdivision (b) of Section 3289 of the California Civil
3 Code states: "If a contract entered into after January 1, 1986, does
4 not stipulate a legal rate of interest, the obligation shall bear
5 interest at a rate of 10 percent per annum after a breach."

6 29. Therefore, Plaintiffs demand interest on the amount of
7 wages due weekly at the rate of 10% per annum as required by law.
8

9 FOURTH CAUSE OF ACTION: WAITING PENALTIES

10 (California Labor Code Section 203)

11 30. Plaintiffs hereby incorporate each and every allegation
12 contained of this Complaint above and reallege said allegations as
13 though fully set forth herein.

14 31. California Labor Code Section 203 states "If an employer
15 willfully fails to pay, without abatement or reduction, in
16 accordance with Sections 201, 201.5, 202, and 205.5, any wages of an
17 employee who is discharged or who quits, the wages of the employee
18 shall continue as a penalty from the due date thereof at the same
19 rate until paid or until an action therefor is commenced; but the
20 wages shall not continue for more than 30 days."
21

22 32. The named plaintiff and the majority of class members
23 terminated employment more than 30 days prior to the filing of this
24 lawsuit.

25 33. Therefore, Plaintiffs demands waiting penalties according
26 to law.
27
28

FIFTH CAUSE OF ACTION: WAGES FOR WORKED BREAK TIME

(California Labor Code Section 226.7)

34. Plaintiffs hereby incorporate each and every allegation contained of this Complaint above and reallege said allegations as though fully set forth herein.

35. Pursuant to California Labor Code Section 226.7, and the wage orders issued pursuant to said statute, the plaintiffs and the class members were entitled to paid 10 minute breaks for every four hours of daily employment and an unpaid meal break of 30 minutes after five hours of daily employment.

36. Although the plaintiffs and the class members regularly worked for amounts of time each day that would entitle them to the paid and unpaid rest and meal breaks provided for under California Labor Code Section 226.7 they often did not receive such daily rest and meal breaks and they did not receive one hour of additional pay on the days they did not receive such breaks.

37. Therefore, Plaintiffs demand the payment of an additional one hour of pay for each day that they were not provided with the breaks required by California law.

NOW THEREFORE, Plaintiffs pray for relief for themselves and all class members as follows:

1. Premium pay for overtime hours worked according to the Wage Orders of the Industrial Welfare Commission applicable at the time work was performed;

1 2. One hour of additional wages for each day that they worked
2 and were not provided with the breaks required by California law;

3 3. Interest at the legal rate of 10% per annum, from each week
4 payment of wages were due for each and every class member;

5 4. Waiting penalties as provided for under Labor Code Section
6 203;

7 5. Attorneys fees and costs as required by Labor Code Section
8 1194;

9 6. Equitable and injunctive relief including restitution;

10 7. Such further relief the court deems just and reasonable.
11
12

13 Dated this 1st day of June, 2007

14 Thierman Law Firm

15 /s/

16 By: _____
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